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IN THE

SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1979

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NO. 79-355

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JULIO CABRERA SANCHEZ,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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The State of Texas, Respondent herein, by and through the Attorney General of Texas, respectfully requests that the Court deny the Petition for Certiorari seeking review of a judgment and opinion of the Texas Court of Criminal Appeals, entered on February 12, 1979.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at 582 S.W.2d 813. As stated by Petitioner, the motion for rehearing en banc was denied without written opinion.

JURISDICTION

Petitioner's jurisdictional statement (Petition for Writ of Certiorari at 2) is acceptable.

QUESTIONS PRESENTED

WHETHER PETITIONER'S INITIAL DETENTION AND ARREST WERE BASED ON PROBABLE CAUSE AS REQUIRED BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

WHETHER THE MARIJUANA DISCOVERED IN LARGE BURLAP BAGS INSIDE PETITIONER'S LOCKED AUTOMOBILE TRUNK WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

STATUTORY PROVISIONS INVOLVED

Petitioner cites and sets forth U.S. CONST. amend IV.; U.S. CONST. amend XIV, §1; TEXAS PENAL CODE ANN. §42.08 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon); TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon); TEX. REV. CIV. STAT. ANN. art. 6701(d), §§140-42 (Vernon); TEX. REV. CIV. STAT. ANN. art. 6701(L-1) (Vernon).

STATEMENT OF THE CASE

The textual portion of Petitioner's statement of the case (Brief of Petitioner at 6-11) is basically adequate.

REASONS FOR DENYING THE WRIT

I. BECAUSE PROBABLE CAUSE EXISTED INITIALLY TO DETAIN PETITIONER, HIS ARREST WAS CLEARLY LEGAL UNDER TEXAS LAW AND WAS NOT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner has contended that his detention by Border Patrol agents was in error because the agents not only lacked the legal authority initially to detain Petitioner, but could not properly identify Petitioner's car as the speeding vehicle which had earlier eluded their pursuit. Petitioner has further argued that the agents stopped Petitioner's car because it was the first car they came upon after their fruitless pursuit of the speeding automobile.

Petitioner's allegation is inaccurate. The Border Patrol agents did not "stop" his car; they did, however, detain Petitioner after they encountered him stopped on the highway. At trial both agents testified that, based upon the smell of alcohol present on Petitioner and his suspect actions, it was their opinion that he was intoxicated. Petitioner suggests that because the Border Patrol agents were not "peace officers" as defined by Texas law they had no authority to detain him even after discovering him in an intoxicated state.

Petitioner's argument is wholly without merit. To insist that the Border Patrol agents were bound to allow Petitioner to return to the highway after they had discovered that he was drunk ignores Texas law as well as common sense. As noted by the Texas Court of Criminal Appeals, public drunkenness, to the extent that one may endanger himself or another, is an offense against the public peace. TEX. PENAL CODE ANN. §42.08 (Vernon); *Heck v. State*, 507 S.W.2d 737 (Tex.Crim.App. 1974); *McEathron v. State*, 294 S.W.2d 822 (Tex.Crim.App. 1956). Furthermore, Petitioner's operation of a motor vehicle while intoxicated was a

clear violation of TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon).

Under Texas law, a private citizen may, without warrant, arrest a person found drunk in a public place. TEX. CODE CRIM. PROC. ANN. art. 14.01 (Vernon). *Heck v. State, supra; McEathron v. State, supra.* In Petitioner's case, however, the Border Patrol agents did not actually arrest him, but rather detained him until the arrival of police officers who were "peace officers" under TEX. CODE CRIM. PROC. ANN. art. 2.12 (Vernon). These officers independently determined that Petitioner was intoxicated and consequently arrested him. Petitioner's arrest for driving while intoxicated is not challenged by him. His argument instead centers on his initial detention by the Border Patrol agents. This detention was not only legal, but was commendable in view of Petitioner's impaired driving ability. His allegations concerning his initial detainment and subsequent arrest are without merit and should not be reviewed by this Court.

II. THE MARIJUANA DISCOVERED INSIDE LARGE BURLAP BAGS DURING A SEARCH OF PETITIONER'S LOCKED TRUNK WAS NOT SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner challenges the constitutional validity of the search and subsequent seizure by law enforcement officials of the marijuana found in the locked trunk of his car. He argues that the seizure was not permissible with the "privacy" guidelines established by this Court in *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, ___ U.S. ___, 99 S.Ct. 2586 (1979). Petitioner further argues that pursuant to the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), the

search was unreasonable because it was not pursuant to the normal caretaking or inventory procedures commonly conducted by police in order to protect themselves and the public.

This Court has determined that the probable cause necessary to institute a search is dependent on the "reasonableness" of a seizing officer's belief that the contents of an automobile offend against the law. *Chambers v. Maroney*, 399 U.S. 42, 48 (1970), *quoting Carroll v. United States*, 267 U.S. 132, 158-159 (1925). The reasonableness of a search depends on all the facts and circumstances of each case. In Petitioner's case Border Patrol Agent Melton testified that he had initially observed that the trunk of Petitioner's automobile appeared to be heavily loaded. He further testified that Petitioner refused to open the trunk. Prior to Petitioner's arrest and removal to the sheriff's department, Melton noticed, emanating from the vehicle's back seat, an odor which he decided while driving to the police station was marijuana. Arriving at the sheriff's department headquarters, Agent Melton advised one of the arresting officers, Deputy Martinez, of the odor he had smelled in Petitioner's car. At the station Agent Melton opened the back door of Petitioner's vehicle and again smelled the odor. Then, in cooperation with Deputy Martinez, Melton looked into the back seat area and saw through two existing holes made for stereo speakers, large burlap bags of the type commonly used to transport marijuana. The Texas Court of Criminal Appeals held that these circumstances were sufficient to constitute probable cause to search the trunk of the automobile.

In *Chambers v. Maroney*, the Court held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally search the car later at the station house without first obtaining a warrant. In that case, as here, the probable

cause that developed at the scene carried over to the station house. *Chambers v. Maroney, supra*, 399 U.S. at 52. Agent Melton first smelled the odor of marijuana in Petitioner's car at the place on the highway where Petitioner was initially detained and arrested. Only a few minutes elapsed between the initial arrest of Petitioner for driving while intoxicated and the arrival at the police station where Melton was able to verify his suspicions.

Petitioner has contended that Fourth Amendment principles which invalidated searches of closed containers in *United States v. Chadwick* and *Arkansas v. Sanders* should also provide protection for Petitioner and the contents residing in the locked trunk compartment of his automobile. This argument is without merit. This Court has held that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." *Arkansas v. Sanders*, ___U.S.___, 99 S.Ct. at 2591. In addition the Court has repeatedly recognized that the inherent mobility of automobiles often makes obtaining a warrant impracticable. Once seized automobiles are taken from the highway, police are usually held responsible for providing some appropriate location where the automobiles can be kept, with due regard to the safety of the vehicles and their contents, until a magistrate can rule on the application for a warrant. Such a constitutional requirement, this Court noted in *Arkansas v. Sanders*, imposes severe, even impossible, burdens on many police departments. See *Arkansas V. Sanders*, ___U.S.___, 99 S.Ct. at 2594 n. 14. The Court itself distinguished *Arkansas v. Sanders*, by stating that *Arkansas* requires only that a warrant be obtained before *personal luggage* is searched, and that the extent to which the Fourth Amendment applies to containers and other articles depends not upon whether they were seized from an automobile. Respondent would submit,

and apparently the Court has agreed, that the seizure of a suitcase or locked footlocker is quite different from the seizure of an automobile. See *United States v. Chadwick, supra; Arkansas v. Sanders*, ___U.S. at ___, 99 S.Ct. at 2594 n. 14.

Not all containers and packages found by police during the course of a search will deserve full protection of the Fourth Amendment. Some containers by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be opened to "plain view", thereby obviating the need for a warrant. *See Harris v. United States*, 390 U.S. 234, 236 (1968). *Arkansas v. Sanders, supra*, ___U.S.___, 99 S.Ct. at 2593 n. 13. In Petitioner's case, Agent Melton testified that by merely peering into the holes made for speakers in the back seat of the car, he could clearly view burlap sacks of the type used to transport marijuana. That fact, coupled with the odor emanating from the compartment, removed any "privacy" barriers to the subsequent search and seizure of the marijuana from the locked trunk.

Finally, Petitioner relies heavily upon *Cady v. Dombrowski*, 413 U.S. 433 (1973), as invalidating the warrantless search of his vehicle. (Brief of Petitioner at 12-13). But *Dombrowski* is inapplicable because it involved an inventory search of a type not involved in the instant case. For that reason, Respondent does not rely upon *Dombrowski* in justification of the search.

Instead, Respondent argues first that there was probable cause to arrest Petitioner and subsequently to search his automobile trunk. Second, once Petitioner's car was legitimately brought to the station house, any additional intrusion involved in simply immobilizing the car until a warrant could be obtained was no less significant than that involved in the station house search: "[T]here is little to choose in terms of practical

consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Texas v. White*, 423 U.S. 65, 70 (1975), *quoting Chambers v. Maroney*, 399 U.S. at 52.

Petitioner's attempt to have the Court impose the legal refinements of *Arkansas v. Sanders*, *United States v. Chadwick*, and *Cady v. Dombrowski* having no relationship to the policies underlying those decisions does not merit consideration by this Court. The search of Petitioner's locked car trunk was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

WHEREFORE, for the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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